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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

INTERNATIONAL ENGINEERING COMPANY, A Division of A-T-O, INC., *Petitioner*

v.

JAMES R. SCHLESINGER, Secretary of Defense, ET AL., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, International Engineering Company, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 512 F.2d 573 (1975), *sub nomine, International Engineering Company, Division of A-T-O, Inc., v. Elliott L. Richardson, Secretary of Defense, et al.* It appears in Appendix A. The subsequent orders of the Court of Appeals denying Petitioner's petition for rehearing and rehearing *en*

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banc are also reproduced in Appendix A. The first opinion of the United States District Court for the District of Columbia is reported at 361 F. Supp. 818 and appears in Appendix D. The second opinion of the District Court is reported at 367 F. Supp. 640 and appears in Appendix B. The Findings of Fact and Conclusions of Law supporting that opinion appear in Appendix C. The mandate of the Court of Appeals was stayed pending consideration of Petitioner's motion for rehearing, or rehearing *en banc*. An additional stay was granted pending application for certiorari. A Motion for a Stay pending consideration of this Petition has been made in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 2, 1975. Petitioner's petition for rehearing or rehearing *en banc* was denied on June 19, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

This case involves the rights of the public, the Government, and the originators of billions of dollars worth of trade secrets presently in the possession of Federal agencies, and the ability of these parties to protect their respective rights within the jurisdictional boundaries of the Federal District Courts and the Court of Claims. It involves the right of an originator of data presently in the Government's possession to obtain judicial review of the procedural validity of actions by Air Force officials governed by regulation and the Constitution. These actions resulted in a determination to release the originator's trade secrets into the public domain without first affording the

minimal procedural due process required by the Constitution and the Armed Services Procurement Regulation.

Petitioner asks this Court to decide whether Petitioner can obtain the only effective relief—an injunction against wrongful disclosure—from the only forum empowered to grant it—a Federal District Court.

The central question to be decided in this case is whether a Federal District Court has jurisdiction to hear and determine a suit for declaratory judgment and injunctive relief by a Government contractor when that Court finds:

a. That Federal officials, from the Departmental Secretary on down, refused to afford Petitioner the minimal procedural due process required by the Armed Services Procurement Regulation and the Fifth Amendment to the Constitution before making a decision to place Petitioner's trade secrets and private property in the public domain; and

b. That Petitioner's only alternative forum would be in the Court of Claims in an action for damages which could be brought only after Petitioner's trade secrets had been disseminated to the public and thereby destroyed.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (1970), and the Armed Services Procurement Regulations, 9-202 and 9-203, which appear in 32 §§ C.F.R. 9.202 and 9.203 (1969). These statutory and regulatory provisions are reproduced in Appendix E to this petition. ASPR 9-203(b) sets forth the mandatory data clause required by the

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regulation. For administrative convenience this clause is set forth at ASPR 7-104.9(a), as well. For purposes of this petition all citations to the contract clause will be to ASPR 9-203(b), the underlying regulation.

STATEMENT OF THE CASE

1. *The Trade Secrets:* On July 7, 1969, Petitioner, International Engineering Co., (IEC) agreed to test models of IEC's LORAN-C/D-Guidance System, and to submit reports on such tests to the United States Air Force. In late March 1971, the Air Force requested that additional information concerning the internal circuitry and processes of IEC's LORAN components be included in the reports to be submitted. These components had been developed by IEC at its own expense and the information and data pertaining to the internal logic and circuitry of these components of IEC's System are trade secrets. The disclosure of these trade secrets would permit any other competent manufacturer to reproduce Petitioner's components to its competitive disadvantage. (Finding of Fact No. 45, Appendix C-17).

Recognizing both (a) the extreme competitive disadvantage that would accrue to IEC if the requested data were disclosed to its competitors, and (b) the Air Force's need to utilize such data for internal evaluation purposes, IEC provided the requested data in its reports to the Air Force with a restriction on its use and disclosure in accordance with the Armed Services Procurement Regulation. This type of data was provided in four reports to the Air Force, 70-06-4, 71-05, 71-07, 71-09, at various times. The Armed Services Procurement Regulation establishes the rights and interests in data provided to the Air Force by private industry and individuals. Briefly stated, data pertain-

ing to components developed at private expense can be used by the Air Force only for limited internal purposes and cannot be disclosed outside the Department of Defense. (Appendix E16-17).

2. *The Air Force Threatens to Disclose IEC's Trade Secrets:* On April 19, 1971, the Air Force challenged the propriety of IEC's limitation upon use of the information contained in IEC Report 70-06-4. Petitioner informed the Air Force on June 15, 1971, that the information pertaining to the internal circuitry and logic of IEC's components had only been provided as a courtesy to the Air Force and that under ASPR such data was fully entitled to protection from disclosure to competitors. Moreover, Petitioner offered to delete the trade secrets from the Report if the Air Force wished to widely disseminate the test results. (Appendix C-8).

The Air Force never responded to Petitioner's letter. On June 30, 1971, IEC agreed to conduct tests of a second more advanced LORAN Guidance System, also developed at its own expense, and provide reports on those tests to the Air Force. On July 7, 1971, the Air Force accepted IEC Report 70-06-4. The District Court found that IEC reasonably interpreted the Air Force's final acceptance of this report as an acknowledgement that IEC's trade secrets would be protected by the Air Force. (Finding of Fact No. 17, Appendix C-9).

In October and December 1971, Petitioner submitted two additional test reports setting forth the results of testing accomplished by IEC on its new and updated guidance system. These reports contained, again at the Air Force's request, information relating to the internal logic and circuitry of the components of this new system that IEC developed at its own expense.

Again, the Air Force requested these trade secrets in order to allow it to thoroughly evaluate the test reports on the new IEC guidance system. In accordance with the Armed Services Procurement Regulation, IEC provided these reports containing its trade secrets to the Air Force subject to the restriction that they be used only for certain internal purposes and not be disclosed outside the Department of Defense.

However, by letter of December 28, 1971, the Air Force informed IEC that it would not accept IEC Report 71-09 unless IEC removed or substantiated its right to the restriction on the Air Force's use and disclosure thereof by January 5, 1972. Petitioner immediately responded with a detailed letter that described the development of the components involved at private expense, and cited the Armed Services Procurement Regulation in support of its right to demand restricted use of these portions of the test report describing the internal circuitry and logic of IEC's privately developed components. Five months went by. Then the Air Force, without any prior notice to IEC issued a determination that it was going to disclose IEC's trade secrets into the public domain. (Finding of Fact No. 28, Appendix C-12).

3. *Action of the Secretary of the Air Force:* Petitioner immediately requested the Secretary of the Air Force to delay disclosure of its trade secrets into the public domain, and to issue a determination protecting IEC's rights. The Secretary of the Air Force agreed to postpone disclosure pending his decision. But without disclosing the basis upon which the Air Force had determined to disclose IEC's trade secrets into the public domain in violation of the Armed Services Procurement Regulation, IEC was called upon to make a presentation to the Air Force on June 26, 1972. A

detailed presentation was made by IEC at that time to Air Force representatives, who were under orders not to discuss or in any way reveal to IEC the basis for the Air Force's determination to release Petitioner's data into the public domain. (Finding of Fact No. 31, Appendix C-13). These officials stated at that meeting that the final determination of the Agency's action in this matter would be made by the Secretary of the Air Force. (Appendix C-14).

Months passed without word from the Air Force. At the end of September 1972, IEC's test reports were accepted by the Air Force as originally submitted and final payment for those reports was made. Then, on October 5, 1972, the Air Force Contracting Officer, contrary to his previous statement that the dispute would be determined by the Secretary of the Air Force, determined that he would disclose IEC's trade secrets into the public domain immediately. Again, Petitioner protested to the Secretary of the Air Force and received assurances that the data would not be disclosed pending his decision in the matter. (Appendix C-14-15).

4. *After Redelegation, the Contracting Officer Determined to Disclose the Trade Secrets:* In January of 1973, the Petitioner made a presentation of its position to the Secretary of the Air Force. Again, no comments or statement of position were offered by the Air Force. Then, on February 8, 1973, a fifty-page statement of Petitioner's position in support of its right to prevent disclosure of its trade secrets was presented to the Secretary of the Air Force. But without giving the matter any further consideration and without informing IEC of the Air Force position on Petitioner's rights in the trade secrets, the Secretary redelegated the matter back to the Air Force Chief of Staff with instructions that IEC's February 8, 1973 written pre-

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sentation be considered in any decision rendered. The Air Force Chief of Staff redelegated the matter back to the Commander of Air Force Systems Command who bounced it back to the Electronics System Division, where it was redelegated back to the very same official who had made the initial determination to disclose Petitioner's trade secrets into the public domain. (Appendix C-16).

But, despite the Secretary's direct order, that official did not even read IEC's February 8, 1973 letter. (Appendix C-16). Instead, on May 9, 1973, he again determined to release Petitioner's trade secrets into the public domain. As a result of the redelegation, and the authority vested in the Secretary under the Regulation, the decision of the official at Electronics System Division, Air Force Systems Command, United States Air Force, must be considered to be the action of the Secretary of the Air Force.

5. *The District Court Grants a Preliminary Injunction:* On May 10, 1973, Petitioner filed suit in the United States District Court for the District of Columbia requesting declaratory and preliminary and permanent injunctive relief. In two able and comprehensive opinions, the District Court held that: (a) the determination to release Petitioner's trade secrets into the public domain constituted adverse Agency action and that (b) the actions of the Air Force officials in determining to release Petitioner's trade secrets into the public domain without affording minimal procedural due process constituted a violation of Petitioner's rights conferred by the Armed Services Procurement Regulation and the Constitution of the United States. The District Court pointed out that no independent determination concerning Petitioner's rights had ever been made, and that the Petitioner had never been

given notice of the Agency's reasons for its determination to order public disclosure of Petitioner's trade secrets. (Appendix B-21). A preliminary injunction was issued.

6. *The Court of Appeals Reverses for Lack of Subject Matter Jurisdiction:* The Air Force appealed to the United States Court of Appeals for the District of Columbia. That Court reversed and remanded with orders to dismiss the suit for lack of subject matter jurisdiction. —— U.S.App.D.C. ——, 512 F.2d 573 (1975), Appendix A-15. It held, first, that the Administrative Procedure Act did not apply to this case because the decision to release Petitioner's data did not constitute Agency action. It concluded also, that the Administrative Procedure Act was inapplicable because Petitioner had another "adequate remedy" in the Court of Claims in the form of an action for damages after the disclosure was made. In a footnote, the Court of Appeals summarily reversed the holding of the District Court that the general equity jurisdiction of that Court conferred upon it power to hear this case and, further, that the illegal and unauthorized conduct of the Federal officials acting beyond the scope of their authority and in violation of the Constitution deprived them of the defense of sovereign immunity. (Appendix A-14).

7. *Stay of Proceedings Granted:* Petitioner, after motions for rehearing and rehearing en banc were denied by the Court of Appeals, obtained a stay of the Court of Appeals' judgment pending appeal to this Court. The data at issue thus has not been released outside the Government pursuant to the Air Force's determination.

REASONS FOR GRANTING THE WRIT

1. The decision below involves important questions of Federal law concerning the subject matter jurisdiction of the District Court to prevent the wrongful disclosure of trade secrets, through the arbitrary and capricious conduct of Government officials in refusing to accord minimal procedural due process as required by the Constitution and the applicable regulations. We submit that these questions should be settled by this Court.

2. In addition, these questions are of paramount public importance.

a. The manner in which these questions are settled will govern the future course of dealings between originators of data, the Government, and the public, relating to trade secrets in the Government's possession. Further, a decision by this Court would clarify the rights and remedies of those parties, thereby balancing the interest of 1) the originator in protecting his property, 2) the Government in collecting and using infinite amounts of data and information, and 3) the public in obtaining data collected by the Government.

b. The competing interests of the parties should be determined by this Court. And our facts clearly delineate the competing needs and interests of all affected parties. On the one hand, the originator of trade secrets developed at his own private expense seeks to protect those secrets from disclosure to his competitors. On the other hand, the Government has a need for such data for internal evaluation and decision-making. Moreover, the public and industrial competitors also have an interest in obtaining such data in order to evaluate the Government decision-making process and to

compete effectively. And it is notable that under the Armed Services Procurement Regulation at issue in this case, billions of dollars worth of data have been provided to the Government over the past thirteen years. As the District Court Judge ably pointed out in his opinion (Appendix B-11), contracts like the one involved in this case provide (1) more than half the dollar value of all Federal procurements, and (2) upwards of eighty-five percent of all military procurements. In turn, the Federal Government spends some 57.5 billion dollars annually on procurement, including 39.4 billion dollars on military procurement.[1]

c. As the District Judge pointed out, this case also involves the fairness and integrity of the procurement system of the Federal Government. The Government has a need for data pertaining to items, components, or processes, which might be useful to it in its governmental functions. But the Government should exercise fundamental fairness in dealing with the originators of such data. It should not be allowed to wrongfully disclose trade secrets to competitors of the originator by refusing to afford minimal procedural due process in violation of the regulations and the Constitution. If such action cannot be prevented before damage is done, then contractors will be loath to disclose their trade secrets to the Government, and will be further deterred from doing business with the Government.

d. The decision below creates a misalignment of remedies which may well result in a multiplicity of suits and inconsistent decisions on rights in the same item of data. There are myriad Federal statutes and

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[1] U.S. Department of Commerce, Federal Procurement and Contracting Training Manual For Minority Entrepreneurs, at 2 (1975).

regulations governing the collection, preservation and disclosure of data by Federal agencies. Data collection and preservation measures such as the Armed Services Procurement Regulation should confer remedies which are consistent with (1) criminal sanctions against wrongful disclosures by Federal officers such as 18 U.S.C. § 1905 (1970), and (2) the remedies provided by the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1970). Failure to assure such consistency could well result in a situation wherein an originator of confidential data or a trade secret may be compelled by statute or regulation to provide such data to the Government. But the Government in turn may be compelled to release such data to a competitor or the public at large under the FOIA, only to find that subsequently the disclosing Federal officer was subject to criminal penalties, or the public treasury was subject to payment in damages, resulting from such disclosure.

Indeed, the Court below, which held that Petitioner could not seek relief in a District Court to prevent the disclosure of its trade secrets by Federal officers in violation of minimal procedural due process required by the applicable regulation, rendered an incompatible decision within days thereafter. Thus, in *Charles River Park "A", Inc.* v. *Dep't. of Housing and Urban Development,* decided March 10, 1975, amended June 17, 1975, it held that another data originator could obtain review in a Federal District Court of a determination by Federal officers to disclose that data, in response to a FOIA request. Hence, the decision below and *Charles River Park* are inconsistent with each other. Specifically, if an action for damages in the Court of Claims for the data disclosed is an "adequate remedy" so as to preclude Administrative Procedure Act review in the present case, we do not see why such an action should not also be an "adequate remedy" in

Charles River Park.

This conflict is merely illustrative of the legal quagmire created by the lack of consistency in remedies and jurisdiction under the Federal data collection, preservation, and dissemination statutes and regulations. This conflict should be settled by this Court in order to provide for orderly and consistent decisions on competing interests in data.

3. The decision of the Court below, in holding that sovereign immunity is not waived by the Administrative Procedure Act, conflicts with those of other circuits. Other circuits have held that it is waived.

4. Finally, the decision below amazingly held that the actions of the Government officials involved were not "agency action," even though those actions by the Secretary of the Air Force on down would "destroy" Petitioner's trade secrets and, as such, are squarely within the Administrative Procedure Act's definition of "agency action."

I. THE DECISION BELOW ERRONEOUSLY EMASCULATED THE JURISDICTION OF THE DISTRICT COURT BY PROHIBITING IT FROM AFFORDING PETITIONER THE TRADITIONAL PROTECTION AGAINST WRONGFUL DISCLOSURE OF ITS TRADE SECRETS.

A. Petitioner Would Be Irreparably Injured By Being Deprived of Its Right to Minimal Procedural Due Process in an Attempt To Prevent Unlawful Disclosure of Its Trade Secrets:

Under the Due Process Clause of the Constitution, and the regulatory provisions of the Armed Services Procurement Regulation §§ 9-202 and 9-203, Petitioner had a right to certain minimal procedural due process before a determination was made by the Air Force to offer Petitioner's trade secrets to its competitors.

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The District Court found that minimal procedural due process was not accorded Petitioner before the Air Force made its determination. See the District Judge's able opinion at 367 F.Supp. 652-655. (Appendix B-18-24).

In addition, a hearing subsequent to the release of Petitioner's data would not provide an "adequate remedy" which would satisfy the requirements of the Fifth Amendment and ASPR. In any suit for damages in the Court of Claims for wrongful disclosure, that right to procedural due process before a determination to release Petitioner's trade secrets into the public domain would have disappeared forever, and the Petitioner would have been irreparably injured by the loss thereof. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), which this Court reaffirmed last term (*North Georgia Finishing Inc.* v. *Di-Chem, Inc.,* —— U.S. ——, 42 L.Ed. 2d 751 (1975); and see *Pollion* v. *Powell,* 47 F.R.D. 331 (N.D. Ill. 1969); and *Frost v. Weinberger,* 375 F. Supp. 1312 (E.D.N.Y. 1974).

A litigant should not be relegated to an alternative "remedy" that requires the destruction of the very rights which the party seeks to uphold. In *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752 (1947), the Court held that a party need not pursue administrative remedies which will "certainly or probably result in the loss or destruction of substantive rights." 331 U.S. at 774.

B. Petitioner Would Be Irreparably Injured by Disclosure of Its Trade Secrets:

1. It is well settled that an injunction will lie to enjoin wrongful disclosure of trade secrets, on the ground of irreparable injury:

An action at law in the Court of Claims for money damages for wrongful disclosure of trade secrets would

be a hopelessly inadequate remedy. It is well settled that the injury caused by the improper disclosure of a trade secret is massively irreparable. No damage award can restore to secrecy what has been revealed, or adequately compensate the owner of data for the results of disclosure. As Professor Jaffe has stated in cogent terms:

> "Irreparable injury in its strictest sense is the probable loss . . . of the value (monetary or moral) of an asserted right or defense. *A classic example is the case where an agency in the course of a proceeding proposes to reveal a document in its possession for which a person claims a right to confidential treatment.*" L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 429 (1965). (Emphasis added, footnote omitted.)

To the same effect is *Utah Fuel Co.* v. *National Bituminous Coal Commission,* 306 U.S. 56 (1939). The Court there held that a District Court had jurisdiction to hear a suit for an injunction against the Coal Commission's disclosure of confidential information. Indeed, this Court then stated in perfectly clear language that the Petitioner there, like IEC here, faced "great and obvious damage," partially because it lacked "any other remedy." 306 U.S. at 60. And this Court has consistently sustained injunctions against the improper disclosure or use of data in other cases as well. *See, e.g., E. I. Du Pont De Nemours Powder Co.* v. *Masland,* 244 U.S. 100 (1917); *Board of Trade of the City of Chicago* v. *Christie Grain & Stock Co.,* 198 U.S. 236 (1905).

Moreover, the lower courts have almost universally enjoined the wrongful use or dissemination of trade secrets, on the ground of irreparable injury. Indeed, the entitlement of a trade secret owner to an injunction

against such use or disclosure has been recognized so consistently, that injunctions are granted almost as a matter of course in such cases. *See, e.g., E. W. Bliss Co.* v. *Struthers-Dunn, Inc.*, 408 F.2d 1108 (8th Cir. 1969); *Herold* v. *Herold China & Pottery Co.*, 257 F. 911 (6th Cir. 1919); *Kodekey Electronics, Inc.* v. *Mechanex Corp.*, 486 F.2d 449 (10th Cir. 1973); *John T. Lloyd Laboratories, Inc.* v. *Lloyd Brothers Pharmacists, Inc.*, 131 F.2d 703 (6th Cir. 1942); *Com-Share, Inc.* v. *Computer Complex, Inc.*, 338 F.Supp. 1229 (E.D. Mich. 1971), *aff'd*, 458 F.2d 1341 (6th Cir. 1972); *Smith* v. *Dravo Corp.*, 203 F.2d 369 (7th Cir. 1953); *B. F. Gladding & Co., Inc.* v. *Scientific Anglers, Inc.*, 245 F.2d 722 (6th Cir. 1957); *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 454 F.2d 527 (1st Cir. 1972); *Raybestos-Manhattan, Inc.* v. *Rowland*, 460 F.2d 697 (4th Cir. 1972); *Bull* v. *Logetronics, Inc.*, 323 F.Supp. 115 (E.D. Va. 1971); *Bryan* v. *Kershaw*, 366 F.2d 497 (5th Cir. 1966), *cert. denied*, 386 U.S. 959 (1967); *American Ice Co.* v. *Royal Petroleum Corp.*, 261 F.2d 365 (3d Cir. 1958); *Winston Research Corp.* v. *Minnesota Mining & Mfg. Co.*, 350 F.2d 134 (9th Cir. 1965).

Now, contrary to this massive wall of settled law, the U.S. Court of Appeals for the District of Columbia stands out alone and unsupported.[2] The criticality

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[2] The complete lack of support for the Court's conclusion is shown by the fact that it cited only a single case, which simply has no application to ours. It cited *Aktiebolaget Bofors* v. *United States*, 153 F. Supp. 397 (Ct. Cl. 1957) for the proposition that IEC could recover the fair market value of its data. But the *Bofors* case did not even involve trade secrets. There, the plaintiff sued for damages for the breach of a license to manufacture guns. The United States had breached its license agreement by shipping Bofors guns overseas. The plaintiff's damages could be easily computed from the number of shipments, and the license remained intact.

As this Court recognized in *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 475 (1974), "The subject of a trade secret must be

of this single deviation from this generally accepted and long standing rule of law is multiplied many-fold in the case of threatened disclosure by a Federal officer since the great majority of suits with multiple defendants who are Federal officers are brought in the District of Columbia.

2. There is no adequate remedy at law for wrongful disclosure of Petitioner's trade secrets:

The previously cited cases establish that in trade secret controversies, an action at law for damages for wrongful disclosure is simply not an adequate remedy. Petitioner's case falls squarely within these holdings.

More specifically, proof of the value of a trade secret which has been disclosed to competitors is impossible to present in acceptable form so as to provide a basis for a decision in the Court of Claims.[3]

First, the Court of Appeals acknowledged that the only just measure of damages for the loss of Petitioner's data was its "fair market value." Appendix A-14-15. But the determination of the "fair market value" of trade secrets which have been disclosed to competitors is a sheer impossibility as a matter of proof. No one can measure in dollars the extent of use by competitors, or the subtle translation of trade secrets into competitors' products.

Second, Petitioner has no practical chance of recovering the profits it would have earned had its data

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secret. . . ." Once Petitioner's trade secrets are disclosed, its rights in its data will vanish. *Formulabs, Inc.* v. *Hartley Pen Co.*, 275 F.2d 52 (9th Cir.) *cert. denied*, 363 U.S. 830 (1960).

[3] The Court of Claims jurisdiction is limited to a suit for actual damages incurred and thus a determination of damages is a prerequisite to a decision. See *United States* v. *King*, 395 U.S. 1 (1969).

been kept secret. The appellant's proof in *Winston Research Corp.* v. *Minnesota Mining & Mfg. Co.*, 350 F.2d 134 (9th Cir. 1965), of the profits they would have earned if their data had remained secret was rejected by the court as "highly speculative." 350 F.2d at 144. *See also, Engine Specialties, Inc.* v. *Bombardier Ltd.*, 454 F.2d 527, 531 (1st Cir. 1972).

Third, in our case, the impossibility of recovering damages for the wrongful disclosure of trade secrets is multiplied many times. Usually the trade secrets involved are disclosed only to a single company by a defecting employee. But if the Government should release Petitioner's data through the Defense Documentation Center as it plans to do (Appendix C-15), the information would be broadcast to the world. There would be no practical way for Petitioner to discover who received the data after its disclosure, or to measure how Petitioner's trade secrets were subtly translated into competing hardware.

Fourth, proof of the value of a "competitive advantage," as a practical matter, is also impossible. In *Bryan* v. *Kershaw*, 366 F.2d 497 (5th Cir. 1966), *cert. denied*, 386 U.S. 959 (1967), the Court suggested that the incalculability of a competitive advantage is itself sufficient grounds to enjoin the improper disclosure or use of trade secrets:

> ". . . the creation of a marketing advantage by virtue of a breach of confidence weighs heavily in favor of injunctive relief. Indeed, it can be said that the unfair advantage gained is the damage that the injunction is designed to cure." 366 F.2d at 501-2.

Fifth, the impossibility of adequately computing damages after the wrongful disclosure of trade secrets

perhaps explains why, since the Court of Claims was created in 1855, there is apparently only one case in which it has awarded any money damages at all even relating to the disclosure of trade secrets. *Padbloc Co., Inc.* v. *United States,* 161 Ct. Cl. 369 (1963). And the unique facts of that case bear no resemblance whatever to ours.[4]

The fact that for over 100 years, there appears to have been only one successful action in the Court of Claims for damages even relating to disclosure of trade secrets, demonstrates the practical inadequacy of any such remedy in Petitioner's case. *See, e.g., Mannings* v. *Board of Public Instruction,* 277 F.2d 370 (5th Cir. 1960); *Marsh* v. *County School Board of Roanoke County, Va.,* 305 F.2d 94 (4th Cir. 1962); *McCoy* v. *Greensboro City Board of Education,* 283 F.2d 667 (4th Cir. 1960).

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[4] The Court of Claims could easily compute the plaintiff's damages in *Padbloc.* The Government breached an implied contract to use data only for the inspection of certain fire bomb packaging which the data described. The plaintiff had promised to give the Government a royalty free license to use and disclose the data after the procurement of 104,000 bombs which were wrapped in Padbloc's packaging. The damage from the Government's premature disclosure of the data could be easily computed by determining the profits Padbloc would have earned on the procurement of the 104,000 bombs. Thus, Padbloc had already agreed to disclose its trade secrets for certain consideration. It remained only for the Court of Claims to direct that such consideration be paid. Petitioner herein never agreed to the disclosure of its trade secrets at any price.

II. THE COURT OF APPEALS DISREGARDED DECISIONS OF THIS COURT BY APPLYING THE BAR OF SOVEREIGN IMMUNITY EVEN THOUGH AIR FORCE OFFICIALS EXCEEDED THEIR STATUTORY AND CONSTITUTIONAL POWERS.

A. Defendants Exceeded Their Statutory Authority in Determining To Put Petitioner's Trade Secrets into the Public Domain.

In *Dugan* v. *Rank*, 372 U.S. 609 (1963), the Court set two exceptions to the doctrine of sovereign immunity:

> ". . . (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. 372 U.S. at 621-2.

These exceptions are both applicable to this case. The District Court held that the ASPR provisions involved require minimal procedural due process before a determination to release Petitioner's trade secrets into the public domain. Appendix B-21. The Court of Appeals did not even discuss this subject; and Petitioner submits that the holding of the District Court is sound and should be accepted by this Court.

Specifically, in deciding to disclose the data without first affording Petitioner even minimal procedural due process, the Defendants exceeded their statutory powers. They had no authority under which they could release data except that contained in ASPR 9-202.3, as further implemented by ASPR 9-203(b). Moreover, the legal force of ASPR 9-202.3 is derived from its independent status as a regulation, and not from the presence of implementing language in a contractual agreement. This Court has recognized that even when a regulation is incorporated into a contract, its legal status as a regulation remains un-

affected. *Chapman* v. *Sheridan-Wyoming Coal Co., Inc.,* 338 U.S. 621 (1950).

The regulation authorized only a single procedure for permitting the disclosure of data that the contractor had marked with a "limited rights" legend. But the Defendants did not follow that procedure. Instead they attempted to put Petitioner's trade secrets into the public domain without affording Petitioner the minimal procedural due process required by the Regulation.

A Government official who acts beyond the scope of his authority acts illegally and may be enjoined from doing so. Indeed, when a Government official exceeds his statutory powers, we do not even reach the subject of sovereign immunity. *Dugan* v. *Rank, supra.* In *Greene* v. *McElroy,* 360 U.S. 474 (1959), this Court reversed a summary judgment refusing an injunction against the continued denial of access to classified information. The Court based its reversal on the fact that the procedure by which Greene's security clearance had been removed was unauthorized. 360 U.S. at 508. *See also, Harmon* v. *Brucker,* 355 U.S. 579 (1958).

B. The Defendants Also Exceeded Their Constitutional Authority in Determining To Put Petitioner's Trade Secrets into the Public Domain:

The District Court held that, if the ASPR did not require the Defendants to afford Petitioner minimal procedural due process before they decided to disclose Petitioner's data, the regulations would violate the due process clause of the Fifth Amendment, Appendix B-22. It is elementary that where a Government official exceeds his constitutional powers, sovereign immunity is not involved. And actions which threaten

an unconstitutional exercise of power may also be enjoined. *Dugan* v. *Rank, supra.*

In *Malone* v. *Bowdoin,* 369 U.S. 643 (1962), this Court reiterated that sovereign immunity did not bar a suit against a deprivation of property that constituted "an unconstitutional taking of property without just compensation." 369 U.S. at 648, *quoting Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 697 (1949).

C. If Sovereign Immunity Should Be Deemed To Be Involved, It Has Been Waived by the Administrative Procedure Act.

1. The Contracting Officer's decision to disclose Petitioner's trade secrets is "Agency Action" under the Administrative Procedure Act.

The decision to release Petitioner's trade secrets into the public domain was reviewed and upheld at the highest levels of the Air Force (*See* Appendix C-15-16). Nevertheless the Court below held that the Administrative Procedure Act does not apply to this case because the decisions by Air Force officials did not constitute agency action. (Appendix A-13-14).

We submit that the Court's holding was in error. It is plain from the words of the Administrative Procedure Act that the Air Force's decision to release Petitioner's data was "AGENCY ACTION." That term is defined in 5 U.S.C. § 551(13)(1970) as ". . . the whole or a part of any agency rule, order, license, *sanction*. . . ." (Emphasis added). The definition of sanction includes the "destruction, taking, seizure or withholding of property. . . ." 5 U.S.C. § 551 (10)(D) (1970). The Air Force's decision to release Petitioner's data constituted a sanction of the most vivid sort. Indeed, the public disclosure of Petitioner's trade secrets would

irreparably and irretrievably "destroy" Petitioner's property rights in those secrets.

2. There is a conflict in the circuits as to whether the Administrative Procedure Act waives sovereign immunity, which should be resolved by this Court:

There is a conflict in the circuits as to whether the Administrative Procedure Act waives sovereign immunity. We submit that the better view is that it does. *Scanwell Laboratories Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970); *Estrada* v. *Ahrens,* 296 F.2d 690 (5th Cir. 1961); *Kletschka* v. *Driver,* 411 F.2d 436 (2d Cir. 1969). *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 27.00 (1970). As the Fifth Circuit concluded in *Estrada* v. *Ahrens, supra:*

> "By providing judicial review in an action brought by 'any person adversely affected or aggrieved by any agency action' Congress permitted suits which under established tests would certainly be barred as suits against the Government. 296 F.2d at 698.

The decision below held to the contrary.

3. Waiving sovereign immunity in our case will not "Destroy the Court of Claims."

The Court below stated that if the APA waived sovereign immunity, that would "destroy the Court of Claims by implication." Appendix at A-13, *quoting Warner* v. *Cox,* 487 F.2d 1301, 1306 (5th Cir. 1974). But no such terrible catastrophe can be anticipated. For the APA only applies if there is "no other adequate remedy in a court . . ." 5 U.S.C. § 704 (1970). And we have shown above that an action for damages in the Court of Claims would be hopelessly inadequate as a remedy for wrongful disclosure of trade secrets.

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Also, *Warner* v. *Cox, supra,* has no application whatever. The plaintiff in *Warner* invoked the Administrative Procedure Act in a District Court suit in which equitable relief was claimed. But, the so-called suit in equity appears to have been an attempt to obtain monies from the public treasury far in excess of the District Court's jurisdictional limit under the Tucker Act.

CONCLUSION

The Court of Appeals for the District of Columbia Circuit erred in ordering the District Court to dismiss Petitioner's suit for lack of subject matter jurisdiction.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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